

# LEGISLATION AND EXPERTISE ON GOALS

Jaap Hage\*

## A. DEMOCRACY AND THE COGNITIVE GAP

Nowadays much legislation is effectively brought about by experts. Of course the usual procedures have to be followed – for instance parliamentary approval – but effectively the decisions about the contents of much legislation are taken by experts without democratic legitimacy. It is, for instance, possible that the contents of legislation about compulsory treatment of psychiatric patients is effectively brought about by psychiatrists. When I write about “expert legislation” in the rest of this paper, I mean legislation the *content* of which was effectively determined by experts. This does not detract from the fact that the legislation is officially brought about by state agencies such as Parliament, or the national government.

Import from experts in legislation may be a welcome contribution to legislative quality, but there are also practical disadvantages to this role of experts. One example would be that the knowledge of the so-called experts is too one-sided, with as consequence that the “expert legislation” turns out to neglect relevant values or interests. For instance, it may be argued that a psychiatrist does not have all the relevant knowledge to make good legislation on compulsory treatment of psychiatric patients, because good legislation on this topic also requires knowledge about human rights, and about the impact of these patients on their near environment and on society as a whole. Legislative expertise, if it can be available at all, will seldom or never be the expertise of one or more individual persons with a particular scientific specialisation. At best it is available in a team of “experts”, which includes persons who are knowledgeable in different fields.

Partial expertise is an important issue when it comes to expert legislation, but in this paper I want to address a more fundamental objection against expert legislation, namely that the required expertise cannot exist. Briefly stated, the objection boils down to the following: The quality of legislation depends in part on the goals pursued by means of the legislation. There can be no expertise on goals because they are not an object of knowledge, but rather of adoption.

---

\* Professor of Jurisprudence, Universities of Maastricht and Hasselt. E-mail: jaap.hage@maastrichtuniversity.nl. Thanks go to Michal Araszkiwicz for stimulating discussions on the nature of justification during the spring of 2009, which have inspired much of section III, and to Pauline Westerman, Arend Soeteman and an anonymous reviewer for *Legisprudence*, for useful comments on draft versions of this paper, and suggestions for improvement.

Knowledge which standards are good, or suitable, is fundamentally impossible, and expertise on this subject is for the same reason out of the question. I will call this the “cognitive gap”.

I will argue that the argument from the cognitive gap is flawed, basically because it confuses truth and justification. In section II, I will spell out the argument from the cognitive gap in somewhat more detail. The core of this paper is section III, in which I will offer an account of justification, and argue why according to this account expertise on standards is in principle possible. That cuts the bottom out of the cognitive gap argument against expert legislation. In the concluding section, I will indicate what this means for the possibility of expert legislation.

## B. THE PRESUMED LIMITS OF EXPERTISE

Spelled out in some detail, the argument from the cognitive gap against expert legislation might run as follows. Any judgement that something is good, including the judgement that some piece of legislation is good, is based on two “components”. One component consists of the factual characteristics of the evaluated object; the other component is a standard that says that these characteristics make the object into a good one. A good television set, for instance, is good because we employ a standard for television sets declaring them to be good if they produce a bright picture and realistic sound, and because this particular set has these factual characteristics. Another example would be that thieves are bad persons (standard), and that Jane is a bad person (evaluative judgement), because she is a thief (fact).<sup>1</sup>

Standards come in different types. They can reflect values, such as liberty or equality, they can be rules that exist as institutional facts, such as the rule that one ought to drive on the right hand side of the road, or they can be goals that happen to be pursued (to visit Maastricht, for instance), or that are based on deep human needs, such as the goal to have something to eat. For the purpose of argument I will focus in the remainder of this paper on only one kind of standard, namely goals and I assume that the conclusions of my argument with regard to goals apply by analogy to the other kinds of standards.

Goals underlie reasons for action, because the fact that a potential act promotes a goal is a reason for performing this act if it has not been performed yet, and a good making characteristic for an act that has already been performed. Some goals just happen to exist, while other goals have been adopted for better or worse reasons. What sets goals off from facts, however, is that they seem not to be part of the world in the way that facts are. Facts seem to be there independent

---

<sup>1</sup> Richard Hare has made a considerable effort to point this out. See for instance R M Hare, *Freedom and Reason*, (Oxford University Press, 1963), chapter 2.

of what we think of them, while goals depend on adoption<sup>2</sup> by human beings. To state it in philosophical-technical jargon: we tend to be realists with regard to facts, and non-realists with regard to goals.<sup>3</sup> Consequently we assume that facts are the same for everybody, whether they know it or not, while it is possible that different persons adopt different goals.

Let us assume that experts have a good knowledge about their field of expertise. Because the facts in this field are assumed to be the same for everybody, chances are big that experts will agree with each other about these facts. If they do not agree, this may well be taken as evidence that the level of expertise of at least some of them is not up to standard. If in some field there are no facts to be had – for non-believers, astrology would be a case in point – agreement between “experts” is less likely. In fact, it may be argued that where there is no object of expertise, expert knowledge is impossible and so is the existence of experts. Since goals do not exist in the world in the way facts exist, goals would not be an object for expertise in the way facts are. Expertise on goals would be impossible and therefore there would be no experts on goals.

At first sight this argument why expertise on goals is impossible is vulnerable to objection. For the evaluation of legislation it is not necessary to use goals that were actually adopted. A value judgment on a piece of legislation would be equally good, if not better, if it were based on a standard that *should* have been adopted. For instance, legislation promoting a high degree of labour participation is good, not only if it is an actual goal of the government to increase labour participation, but also if it should have been such a goal. Whether a goal should have been adopted depends on the reasons for and against adoption, and these reasons are facts. One such a fact might be that an increase in labour participation leads to higher standards of living. Since expertise on facts like this is possible, expertise on which goals should be adopted would be possible too. At least, that is the objection.

Does it cut ice? Seemingly not. Goals can be based on facts, but they only “follow” from these facts with the help of some other standard which is not a fact itself. Take for instance the goal to increase labour participation. An increase in labour participation leads to higher standards of living; that may be a fact. But one needs an additional standard to translate this fact into a reason for adopting the goal to increase labour participation. That standard might be the goal to heighten the standard of living. This goal in itself is not a fact, but there may be reasons for adopting it, for instance that a heightened standard of living leads to a greater overall happiness. This fact (let us assume that it is a fact) is not a reason in itself, but only because of some other standard, for instance that it is good to increase happiness. There may be reasons for adopting this standard, but ... And we could go on in this way for an indefinitely long time, adducing reasons for the

---

<sup>2</sup> The adoption may be a matter of deliberate choice, but also something which happened unconsciously. For the present purposes, this makes no difference.

<sup>3</sup> More on the nature of ontological realism in M Devitt, *Realism and Truth*, (Oxford, Blackwell, 2nd edn, 1991), chapter 2.

adoption of standards, where these reasons are themselves based on standards, for which we can adduce reasons, and so on.

The general conclusion to be drawn from this example is that if there are reasons for or against adoption of a standard, these reasons have underlying standards themselves. Ultimately it is not possible to base standards on facts alone; there will always be some standard from which the chain of reasons starts, a standard which is not adopted for a reason, and which needs not be adopted by everybody. The conclusion must therefore be that all value judgements, including those on the quality of legislation, are somehow based on standards on which no unanimity needs to exist. To state it simply: standards cannot be derived from facts alone, and therefore there need not be unanimity on standards, even amongst rational people.

If only facts can take care of the possibility of unanimity that is needed for expertise, there can be no expertise on value judgements, including those on legislation, because all value judgements that have underlying reasons have, in the end, underlying standards for which no reasons exist, and on which there need not be unanimity. This does not imply that experts have no role in drafting legislation, because all value judgements for which reasons exist have facts as one component of these reasons. On these facts expertise would be possible. But there is always this non-factual component, on which experts as such do not have much to say.

In this section I have tried to present a necessarily brief, but nevertheless within these confines of space as powerful account as possible:

1. why evaluative judgement cannot be founded solely in facts,
2. why this leads to the conclusions that
  - there is no guarantee for unanimity on value judgments, and that,
  - in the last instance, there cannot be expertise on issues of value.

I have offered this account to show its weakness, because in my opinion it is fundamentally flawed. To argue why it is flawed I will focus on one objection, namely that it confuses truth and justification. Briefly stated, the objection runs as follows:

There may be a fundamental difference between factual judgements and goals because the former have a basis in an independently existing world, while the latter have not. To state it very briefly: factual judgments are true or false, while goals are not. This difference is not reflected in the area of justification, however. Both factual judgments and goals can be adopted, and in both cases it holds that rationally they should be adopted if the reasons for doing so outweigh the reasons against. In both cases the reasons are based on both facts and standards. Therefore, from the perspective of justification, there is no fundamental difference between factual judgments and standards. If expertise is possible with regard to the adoption of factual judgements, it should be possible with regards to

the adoption of goals too. Factual judgements and goals are in this respect on the same footing.

## C. ON JUSTIFICATION

In this section I will offer an account of justification according to which there is no fundamental difference between the justification of beliefs about alleged facts and the justification of (the adoption of) standards. The point of this account is that there is no cognitive gap in the determination of what is good legislation, and that therefore expertise on good legislation is in principle possible.

### 1. Truth and justification

If we want to distinguish between the truth of a statement and its justification<sup>4</sup>, it must be along the line that truth has to do with the relation between on the one hand the content of the statement and on the other hand the world, while justification has to do with the reasons for accepting the statement as true. If the statement states what is the case in the world, or – which is meant to express the same thing – if the statement “corresponds” to the world, it is true, and otherwise false, and this is what is meant with truth or falsity.<sup>5</sup> One consequence of this view is that the truth of a statement only depends on the world, which is assumed to be the same for everybody. A further consequence is that the truth of a statement does not depend on a person; truth is absolute in the sense of person-independent.

Truth may be absolute, but the opposite is the case with justification. If something, for instance a belief, a rule, or an act, is justified, it always means that it is justified relative to some background of other beliefs and standards. For instance, suppose that somebody is justified in believing that the law should allow compulsory treatment of psychiatric patients. He is justified in believing this, because he also believes that compulsory treatment is in the interest of these patients, that this interest is more important than the explicit desire of these patients, and that the law should reflect this balance of interest and desire. Had this person not believed that compulsory treatment is in the interest of the patients, his belief about the content of the law would probably not have been justified either. The same counts if this person had not adopted the standard that

---

<sup>4</sup> In subsection C.5 I will argue that the expression “justification of a statement” is less happy, and that it is preferable to speak of a person being justified in believing something.

<sup>5</sup> This is essentially a realist theory of truth. It is possible to devise truth theories according to which being true has to do with being justified, or being the object of possible agreement, but these non-realist theories of truth leave no clear distinction between truth and justification. See S Haack, *Philosophy of Logics*, (Cambridge University Press, 1978), chapter 7, and R L Kirkham, *Theories of Truth*, (Cambridge, MA, MIT Press, 1995), chapters 3 and 4.

the law should reflect the balance between interests and desires. This illustrates that whether a belief is justified does not depend on the facts, but on what is believed about the facts and on which standards are adopted.<sup>6</sup>

## 2. Positions

To facilitate the rest of the discussion, I want to propose a terminological convention, namely to use the word “position” for everything which can be accepted mentally,<sup>7</sup> such as a belief, a rule, a value, or a goal. A position is something that is amenable to being accepted, but also to being rejected. So a position has not necessarily been accepted.

The mode of acceptance of positions may be different in different cases. A belief is accepted as true or false, a rule as worthy of following or valid, a goal as worthy of pursuing, etc... Nevertheless, all of these positions have in common that a person can decide on whether to accept it or not and can have reasons for or against accepting it. This does, by the way, not imply that every position that was accepted, was accepted for some reason, or even consciously.

All positions can function as (parts of) reasons for or against accepting other positions. For instance, the belief that it is raining is a reason for believing that one should put up an umbrella. And the belief that the autonomy of a person should where possible be respected is a reason against adopting the rule that compulsory treatment of psychiatric patients is allowed.<sup>8</sup>

Given this terminological convention concerning positions, we can say that the justification of a position is always relative to a background of (other) positions.

## 3. Local and global justification

In the literature on legal justification, justification has sometimes been pictured as a deductively valid argument.<sup>9</sup> In such an argument the conclusion (what is justified) must be true given the truth of the premises. The idea behind this kind of justification is that the “justifiedness” of the premises is transferred to the

---

<sup>6</sup> This means that I adopt an internalist account of justification. More on the opposition between internalist and externalist accounts in J L Pollock and J Cruz, *Contemporary Theories of Knowledge*, (Lanham, Rowman and Littlefield, 2nd edn, 1999), 89-92.

<sup>7</sup> The addition “mentally” is included to disallow things that are physically accepted, such as presents.

<sup>8</sup> There are complications here. For instance, it is well defensible that it is not the belief that it is raining which is the reason for putting up an umbrella, but the fact that it is raining. However, such a fact can only be a reason for some person to accept something, if he believes that this fact obtains. The complications have to do with the difference, and also the mutual dependencies, between guiding reasons and explanatory reasons. More on this subject in J C Hage, *Reasoning with Rules*, (Dordrecht, Kluwer, 1997), chapter 2.

<sup>9</sup> See for instance R Alexy, *Theorie der juristischen Argumentation*, (Frankfurt, Suhrkamp, 1978), 273-78 (on “internal” justification), and, on “first order justification”, N MacCormick, *Legal Reasoning and Legal Theory*, (Clarendon Press, 1978), chapter 2.

conclusion, analogous to the way in which the truth of the premises is transferred to the conclusion in more traditionally conceived deductive arguments.

It seems to me that this picture is mistaken in at least two ways. First, because it suggests that “being justified” is a characteristic of positions that is similar to truth, only somewhat “weaker”. Second, because it overlooks the essentially global nature of justification. In a deductively valid argument, the conclusion must be true if the premises are true. This means that the truth of the conclusion is guaranteed by the truth of the premises, and that nothing else is relevant for this truth.<sup>10</sup> For instance, if the statements “All thieves are punishable” and “Jane is a thief” are both true, the statement “Jane is punishable” must be true too. Whatever else may be the case, this cannot influence the truth of the statement “Jane is punishable”, unless it has the implication that one of the premises is false after all.<sup>11</sup> For instance, the fact that Jane is only five years old either has no impact on Jane’s punishability, because the statement “All thieves are punishable” is still considered to be true, or – which is more plausible – it has impact, because it makes the statement “All thieves are punishable” false.

The general point here is that the truth of the conclusion of a sound justificatory argument (deductively valid with true premises) is not influenced by additional information. If the premises of a deductive justificatory argument are true, its conclusion must be true, and then probably also justified, *whatever else is the case*. Therefore, it is not necessary to consider additional information, because this information cannot change the conclusion anymore. Deductive justification is *local* in the sense that it needs only consider the premises and the conclusion of a deductively valid argument.

The reader who thinks this is unrealistic is probably right. Not because deductively valid justification is not local, but because it seldom or never occurs.<sup>12</sup> It occurs seldom, because it requires premises the truth of which cannot be established. Take our example about Jane. It requires the premise that *all* thieves are punishable. That premise can only be established if it is already known that Jane is punishable, or if there is a rule that makes all thieves punishable, without exceptions. The former demand would beg the question, because we need the premise about all thieves to justify a belief about Jane. The

---

<sup>10</sup> This should be read as “irrelevant from an argumentation-technical point of view”. The only thing that is really relevant for the truth of a conclusion is whether this conclusion corresponds with the facts. But that has nothing to do with the argument from which the conclusion follows.

<sup>11</sup> This may be interpreted as a reason why justification on the deductive account of it is global too. But then the globality does not lie in the deductively valid argument itself, but in the justification of the premises.

<sup>12</sup> It may be argued that the use of deductive logic in connection with justification is not that it helps the justification of particular positions, but that it shows which positions are required for another position to be justified. But that is not true. From the fact that some premises deductively imply a particular conclusion does not follow anything concerning what is required for the justification of the conclusion. Deductive logic can in theory (but hardly in practice; see the argument in the main text) help to find sufficient reasons for adopting a position, but is of no use in finding necessary conditions.

second demand is unrealistic, because rules tend to have exceptions, and these exceptions cannot be enumerated.

Real life justification is normally based on premises that support the conclusion without guaranteeing its truth. If Jane is a thief, this is a reason to believe that she is punishable, but there may be other reasons which invalidate this conclusion. One such a reason would be that Jane is only five years old. In general a position is justified if the reasons pleading for acceptance outweigh the reasons against accepting it to a sufficient degree. But this means that *all* reasons for or against acceptance must be balanced and that means in turn that justification must be global. A position which is justified in the light of a particular set of other positions need not be justified in the light of an even larger set of other positions, because this larger set may contain additional reasons against adopting it.<sup>13</sup>

In logic there is a technical term for a similar phenomenon: *nonmonotonicity*. A logic is nonmonotonic if a conclusion that follows from a set of premises does not need to follow from a wider set of premises.<sup>14</sup> Analogously we can say that justification is nonmonotonic because a position that is justified in the light of set of other positions, needs not be justified in the light of a still wider set of positions.<sup>15</sup>

Nonmonotonicity and the global nature of justification go hand in hand. The “normal” justification of a position is always relative to a particular position set. To get rid of this relativity, one needs to idealise and to assume that it is possible to consider a position in the light of *all* other positions. A position would be justified in an absolute sense if it is justified in the light of all positions. Obviously, absolute justification is an unrealistic notion for practical purposes, but it is useful as a tool for thinking about the nature of justification.

#### 4. Coherentism

The global nature of justification makes a particular form of coherentism attractive as an account of justification. The idea behind coherentism is that the justification of a position consists in the position being an element of a wider set of positions which somehow “cohere” with each other.<sup>16</sup> Coherentism has the

---

<sup>13</sup> In fact, it is even more complicated, because apart from reasons against a position, there may be reasons why the reasons for adoption are in general not reasons after all, or are excluded in this special case. More details on the “logic of reasons” in Hage, *Reasoning with Rules*, supra, n 8, chapter IV, and in J C Hage, *Studies in Legal Logic*, (Dordrecht, Springer, 2005), chapter 3.

<sup>14</sup> See, for instance, M L Ginsberg (ed), *Readings in Nonmonotonic Reasoning*, (Los Altos, Morgan Kaufman, 1987), 1-2.

<sup>15</sup> A more extensive argument to the same effect can be found in the paper “Law and Defeasibility” in my *Studies in Legal Logic*, supra, n 13, 7-32.

<sup>16</sup> This is one possible version of coherentism. For a brief overview of several alternatives, see K Lehrer, “Coherentism”, in J Dancy and E Sosa (eds), *A Companion to Epistemology* (Oxford, Blackwell, 1992), 67-70.

advantage over foundationalism, its main competitor in the theories of justification, that it does not require a foundational set of positions which are considered to be justified without further reasons, and which are therefore made immune against criticism.<sup>17</sup> This advantage comes with at least two disadvantages.

One is that if justification is considered to exist in a mutual relation between positions only, the connection with the “world outside” seems to be lost. Haack writes in this connection about the *consistent fairy story objection*, or – even more picturesque – the drunken sailors argument, because the elements of a coherent theory may keep each other upright like drunken sailors who cannot stand by themselves.<sup>18</sup> I will address this seeming disadvantage in subsection 5.

The second disadvantage is that the notion of coherence is hard to specify. What does it mean if a set of positions is said to cohere? There are very complicated accounts of this notion of coherence,<sup>19</sup> but it seems that a simple account is possible. If coherence is treated as a characteristic of a set of positions that includes not only beliefs, but also all kinds of standards, a set of positions may also contain the standards that are used to determine whether a particular position is justified in the light of a set of other positions. In fact, a comprehensive position set *would* contain such standards. That makes it possible to use the position set in the definition of coherence. A somewhat simplified account would be the following: A position set is coherent if and only if it includes every position that should be accepted in the light of its content, and does not include any position that should be rejected according to its own content. Because this notion of coherence refers to standards that are contained in the coherent set itself, I have called it “integrated coherentism”.<sup>20</sup> When I write about coherence in the rest of this paper, I mean integrated coherence.

Since a coherent position set includes everything that should be accepted according to itself, such a set will be infinitely large. For realistic justification we will have to operate with more limited sets, while working under the assumption that the limited set is a representative part of a coherent infinite set. I will call this the *soundness assumption*. This soundness assumption is defeasible, in the sense that it may turn out to be incorrect in the light of new information.

Suppose for instance that we are dealing with the belief that Jane is punishable. We know that Jane is a thief and that the rule exists that thieves are punishable. In the light of this limited position set, we should also accept that

---

<sup>17</sup> If there are reasons for immunizing some positions against criticism, these very reasons are the proof that the privileged positions are not privileged at all, but derive their special position in the set of all positions from their relation to other positions in the same set.

<sup>18</sup> S Haack, *Evidence and Inquiry*, (Oxford, Blackwell, 1993), 26-27.

<sup>19</sup> An example would be the theory defended by Peczenik and Alexy. See R Alexy and A Peczenik, “The Concept of Coherence and its Significance for Discursive Rationality” (1990) 3 *Ratio Juris*, 130-47.

<sup>20</sup> J C Hage, “Law and Coherence” (2004) 17 *Ratio Juris*, 87-105. See also Hage, *Studies in Legal Logic*, supra, n 13, 58-59.

Jane is punishable, and the position set should be expanded accordingly. The soundness assumption here includes that there are no other reasons relevant for the punishability of Jane.

When the soundness assumption has been shown<sup>21</sup> to be wrong, the finite position set will have to be modified into another set for which the soundness assumption has not been refuted (yet). If it has been shown that Jane is five years old and that minority (in the sense of criminal law) takes one's punishability away, the soundness assumption has been shown to be wrong. The position set must be expanded to make it include that Jane is five years old and that being a minor takes one's punishability away. And given this expansion of the position set, the belief that Jane is punishable will have to be retracted from it.

## 5. Spontaneous positions

A familiar objection against coherence theories is that a coherent position set may be isolated from reality. A set of positions may be coherent while all positions included in it are false. The elements in the set justify each other, but there is no guarantee at all that the content of the set as a whole somehow reflects reality. This would be problematic, because a position set will normally include beliefs about the "world outside". The limited set consisting of the beliefs that Jane is a thief and that Jane is punishable and the rule that thieves are punishable may be coherent, but does it really justify the belief that Jane is punishable? Maybe Jane does not even exist! From the coherence of the set nothing seems to follow about the truth of the beliefs contained in it. Can such an isolated set justify these beliefs?

This is a familiar objection, but on closer inspection it is not very strong. To see why, one needs to consider how a coherency test of justification will operate in practice.<sup>22</sup> One does not come up with a coherent set of positions from scratch. Normally one starts from an already existing set.<sup>23</sup> The contents of a *real position set*, that is a set that is entertained by some real person, will have two kinds of determinants, rational ones and a-rational ones. The rational determinants make that an existing set is corrected – new positions are added and existing ones are removed – because rationality requires this given the rest of the set. (Remember that the demands of rationality are also specified by the position set.) The a-rational determinants cause "spontaneous" changes to the contents of the set. New

---

<sup>21</sup> Notice the procedural nature of this demand. It does neither require truth, nor justifiability; it requires an actual change in a position set. The relevancy of this dynamic aspect is discussed in J C Hage, "Dialectics in Artificial Intelligence and Law", in Hage, *Studies in Legal Logic*, supra, n 13, 227-64.

<sup>22</sup> There is also a very brief refutation of the consistent fairy tale objection, namely that it confuses truth and justification. That a position is untrue is no objection against a position being justified, or – better – against a person being justified in accepting this position.

<sup>23</sup> Raz writes in this connection about the "base". See J Raz, "The Relevance of Coherence", in J Raz, *Ethics in the Public Domain*, (Oxford, Clarendon Press, 1994), 277-325.

positions are added as a consequence – notice the causal terminology – of perception, memory, intuition, or whatever causes what a person accepts. A person may, for instance, accept something because he mistakenly believes that this is rational in the light of what else he believes. Existing positions are removed, because they are forgotten or abandoned for irrational or a-rational reasons.

These irrational or a-rational influences on a position set are relevant because position sets are biased toward the past. Whether a new position should, from the rational perspective, be added, or an existing one removed depends on the present contents of the set. To see why, one should notice that a particular position can have one of three statuses in the light of (the rest of) a position set:

1. it should be adopted (if not already present) because this is rational;
2. it should be removed (if it is already present) because this is rational;
3. it is neutral in the sense that it should neither be adopted nor removed.

As long as a position set is not coherent – that means in practice: always<sup>24</sup> – the judgement whether a particular position should be added or removed should rationally not be made on the basis of a full position set, but only on the basis of the statuses 1 and 3 of the set.<sup>25</sup> Positions that should not be in the set themselves, should not play a role in determining what else should be in the set. Moreover, positions with status 3 remain in the set, even if there is no reason to adopt them. So “neutral” elements can be justified because they belong to a coherent position set, without being justified by particular reasons in the set. This may, for instance, hold for beliefs caused by perception, or for evaluative judgements caused by “intuition”. Moreover, neutral elements can also play a role in determining whether other elements can remain in the set and are therefore justified. And finally, since rational modifications can only take place on the basis of an existing position set, the original elements of any realistic position set must have been spontaneous positions, that is neutral elements. This is one part of the argument why real position sets do not “hang in the air”. Real sets stem from sets of spontaneous positions, and there is where we should look for the desired “contact with reality”.

A particular position is *justified relative to a position set* if it is an element of this set, and if this set is coherent. Moreover, given the important role of spontaneous positions, the position set should be a real one, held by a particular person.<sup>26</sup> So, the relativity of justification does not only concern position sets, but

---

<sup>24</sup> A real position set will always remain incoherent, if only because adoption of everything that should rationally be adopted leads to an infinitely large set, while the human mind is finite.

<sup>25</sup> Elements with status 1, but were not adopted yet, should also be taken into account.

<sup>26</sup> The idea that position sets may be held by collectivities, for instance in the form of the “body of scientific knowledge”, or by a group of experts, is important, but beyond the scope of this paper. See K R Popper, “Epistemology Without a Knowing Subject” and “On the Theory of the Objective Mind”, in K R Popper, *Objective Knowledge* (Oxford, Clarendon Press, 1972), 106-90.

also persons. A position is justified relative to the set of positions held by a particular person. Therefore it is better to speak of a person being justified in accepting something,<sup>27</sup> than of a position being justified.

How can we be sure that spontaneous positions reflect “the world outside”? We cannot, simply because we cannot compare positions with the world. We can only compare them with what we accept about the world, including spontaneous positions. Somehow, the “outside world” seems out of reach, and the objection that a coherent theory may have no contact with reality seems on the one hand to be correct, but on the other hand also to be unavoidable.

Yet, this is not the whole story. Of some of our positions we *believe* that they reflect an external world. We believe that there is such an external world to begin with, and we also believe that this world influences our spontaneous positions. It should be noted, however, that these beliefs, like all of our other beliefs, belong to our position set, and can be corrected on the basis of the rest of the set. The existence of an external world is a bit like the existence of so-called “theoretical entities”. Entities like electrons cannot be perceived, but their existence is derived from other things that we can perceive. With the external world it is a little different: we believe that we can perceive it, but its existence is still theoretical in the sense that we postulate its existence on the basis of perceptual impressions. The world is, so to speak, necessary to explain our perceptions of it.<sup>28</sup>

In this connection, unanimity plays an important role. If different persons have the same beliefs, this may be taken as a reason to assume that there exists an independent object of belief that causes the unanimity of the beliefs about this object. For instance, the “objective” existence of a table explains why we all, or most of us, see the table and believe that it is there.

Two things should be noticed about this type of justification of beliefs about an objective external world, however. First that this justificatory argument is based on assumptions concerning an external world and the way it can cause our perceptions of it and beliefs about it, and that these assumptions are justified by the same reasons that justify the assumption of the external world. This is circular, but circular in a way that is not detrimental on a coherentist account of justification.

The second thing to notice is that unanimity needs not be explained by an objective external world. Another explanation would be that it is the outflow of

---

<sup>27</sup> This is what is called “doxastic justification”, which is opposed to so-called “propositional justification” (a particular position is justified). See R Neta and D Prichard (eds), *Arguing about Knowledge*, (London, Routledge, 2009), 151.

<sup>28</sup> This should not be read as stating that we believe the external world to exist only because that would explain our beliefs about it. Our cognitive apparatus is such that we spontaneously believe that (most of) our perceptive impressions are impressions of the external world. Eg we do not only spontaneously believe that the sun is shining, but also that the sun is shining in the “outside” world. However, we are able to question this spontaneous belief, and if it is questioned a reason for adopting it (again) is that the external world explains both the existence of our spontaneous beliefs about it, and the convergence of (some of) our beliefs about it with the corresponding beliefs of other persons.

the functioning of our cognitive apparatus. Think in this connection about mathematics. Mathematicians tend to agree on many results of their science, but only some of them attribute this unanimity to an objectively existing world of mathematical objects, such as for instance natural numbers. Another example would be that our moral intuitions are, at least to some extent, innate.<sup>29</sup>

#### D. SUMMARY AND CONCLUSION

We started our detour on justification and coherentism with the hypothesis that there is a fundamental difference between facts and standards, from the latter of which we took goals as our primary target. Knowledge about facts would in principle be possible and therefore expertise on the facts might be a desirable contribution to legislation. Goals would not be a proper object of knowledge. Expertise on goals would therefore be impossible and a role for experts to decide on standards would therefore not be very fruitful. Since goals and other standards play an important role in the determination of what good legislation is, it would be undesirable that legislation is effectively made by experts only.

In the section about justification, I have taken beliefs (about alleged facts) and standards together under the heading of “positions”, because it is both possible to accept a belief and to accept a standard such as a goal. Possibly the superficial grounds for acceptance are different in both cases. It might, for instance, be the case that factual beliefs are usually based on perceptual states, while standards are adopted for reasons or “intuitively”. However, this is doubtful, because most factual beliefs, such as beliefs about causal connections, about non-physical entities such as organisations, feelings, numbers, or about what is *possibly* or *certainly* the case, are not amenable to perception.

But even if there were such a difference, this does not detract from a common “method” that applies to the justification of all positions, namely to evaluate every potential element of one’s position set in the light of the (rest of the) set. Such an evaluation will always be based on both factual beliefs and standards. These beliefs and standards are either spontaneous elements of the position set, or elements that were (or should be) adopted because this is rational. If they are spontaneous elements, they were accepted for no reason. Factual beliefs and standards are in this respect on the same footing: if their adoption was a-rational, their justification consists in not having to be removed on rational grounds. As rational elements their adoption is based on reasons which have their justification in the position set as a whole. Also in this respect factual beliefs and standards are on the same footing.

The “only” difference between factual beliefs and goals would be that the former are *believed* to be grounded in an independently existing reality, while the

---

<sup>29</sup> This position is argued by Hauser. See M D Hauser, *Moral minds: How nature designed our universal sense of right and wrong*, (London, Abacus, 2008).

latter are not. Both kinds of positions depend for their justification on a complex network of other positions, including beliefs and standards, and *prima facie* there seems to be no good reason why expertise on factual beliefs in general is better possible than expertise on standards in general.

One might argue here that this proves that there can be no expertise about facts, just as there can be no expertise about standards. Facts and standards are epistemologically in the same boat, but this might not mean that they are both amenable to expertise, but rather that they are both *not* amenable to expertise. This argument presupposes that expertise is only possible where knowledge is exclusively founded in the world. That presupposition is not very viable. First because it would effectively rule out the very possibility of expertise, and second because we recognise expertise in many fields, including fields about which almost everybody agrees that they are not exclusively founded in the world such as ethics and aesthetics.

What then is an expert? Let me venture a proposal. An expert on a subject is somebody who knows much about this subject, both in an absolute sense and in the relative sense that he or she knows more about the subject than most other persons. Theoretically somebody might be an expert according to this definition without anybody being able to recognise the expertise. For practical purposes an expert is a person who is recognised by others as somebody who knows much about a subject both in an absolute and in a relative sense. Such recognition requires that sufficient relevant other people – those who are also recognised as knowledgeable on the subject – by and large share the views of the experts on the subject of the expertise. In other words, recognisable expertise requires a degree of unanimity on a number of positions and on the relations between these positions. For instance a recognised expert on compulsory treatment of psychiatric patients should have views on such treatment which are shared by other persons knowledgeable in this field, and he should hold these views for reasons which are also by and large recognised as good reasons by those other persons.<sup>30</sup> Only where such unanimity exists to a sufficient degree, expertise is possible.

If we work with this view of expertise, it is clear that there can be expertise on issues that are traditionally considered to be “purely factual”, such as non-controversial areas of chemistry, or history, but also on “standard-based” issues such as the desirability of a high degree of employment, or the dangers of smoking, or of large intake of alcohol. Experts do not only agree on the consequences of smoking and drinking, but also on what makes these consequences harmful. There are also both “factual” and “standard-based” areas in which expertise is, as yet, not possible. Cases in point are respectively the circumstances under which astrological predictions come out true, and the best way to avoid racial problems in big cities with a mixed population. Apparently the possibility of expertise cuts across the distinction between “pure” facts and

---

<sup>30</sup> Notice that this does not require that all views of the expert are shared by other persons.

standards or standard-based judgements. This finding is in line with the more theoretical conclusion that beliefs and standards are on the same footing where justification is concerned.

Which conclusions should we then draw concerning expert legislation? The first and main conclusion should be that the argument from the cognitive gap does not cut ice if it is used against the possibility of legislative expertise. Either there is no cognitive gap (if a foundation in the external world is not required for cognition), or the cognitive gap amounts to a form of scepticism that excludes the possibility of virtually all knowledge. Personally I find the first option more attractive.

The second conclusion should be that, assuming a not too demanding definition, expertise is both possible in some “purely factual” areas and some standard-based areas, while it is also impossible in some other “purely factual” areas and standard-based areas. Anyway, there seems to be no ground to exclude in general the possibility of expert legislation because expertise on legislation would be impossible. That does not detract from the fact that in some fields expertise is (still) impossible and that in those fields “expert” legislation is undesirable.